Supreme Court, U. S.
FILED
SEP 15 1980
MICHAEL RODAK, JR., CLERK

80-408

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

1980 OCTOBER TERM

WILBUR C. BAKER and wife,
ANNIE JO BAKER,

Petitioners,

vs

THE UNITED STATES
OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

W. Paul Thompson
Thompson, Adkinson & Beasley
Attorney for Petitioners
Post Office Drawer 608
DeFuniak Springs, Florida 32433
(904) 892-2117

TO THE SUPREME COURT OF THE
UNITED STATES:

Petitioners, Wilbur C. Baker and wife, Annie Jo Baker, present this their Petition for a writ of certiorari and state:

The question presented for review by this Court is whether the trial court and the appellate court applied the applicable state law in regard to the duty the respondent owed to the petitioners.

The respondent owned, operated and maintained a paved road on its property that was accessible to the public and used by the public. The fact that the respondent owned and maintained the road that was accessible to and used by the public created a certain duty and responsibility for the respondent. This duty is established explicitly by the case law in the State of Florida. See, **Welsh v. Metropolitan Dade County,** 366 So. 2d, 518, (3rd DCA, 1979) (hereinafter cited as **Welsh**); **Trumpe v. City of Coral Springs,** 326 So. 2d, 192, 193, (4th DCA, 1976) (hereinafter cited as **Trumpe**); and **Town of Palm Beach v. Hovey,** 155 So. 808, (Fla. 1935) (hereinafter cited as **Town of Palm Beach**). The fact that the District Court should have held the respondent to the duty established by the Florida Court is clear under the federal cases as seen in the following cases: **Orr v. U.S.,** 486 F. 2d 270, 274 (5th Cir. 1973) (hereinafter cited as **Orr**); **Newman v. U.S.,** 248 F. Supp. 669, (D.D.C. 1965) (hereinafter cited as **Newman**); **Smith v. U.S.,** 237 F. Supp. 675, (D.D.C. 1965) (hereinafter cited as **Smith**); **Gilroy v. U.S.,** 112 F. Supp. 664, (D.D.C. 1953) (hereinafter cited as

Gilroy); **Hernandez v. U.S.**, 112 F. Supp 369, (D. Hawaii 1953) (hereinafter cited as **Hernandez**; and **O'Toole v. U.S.**, 206 F. 2d 912, (3rd Cir. 1953) (hereinafter cited as **O'Toole**). The petitioners claim the duty owed them had been breached by the fact that the respondent had failed to warn the traveling public, and specifically the petitioners, of known dangers on the respondent's road. The law in the State of Florida provides that municipalities and county governments must maintain their streets in a reasonably safe condition and warn the persons using their streets of known dangerous conditions. See, **Welsh, Trumpe,** and **Town of Palm Beach.** There was agreement between the parties in this case and it was specifically found by the trial court that the respondent had failed to warn the petitioners about the danger that existed on the respondent's road. (District Court's Memorandum Decision, appendix page 5). Notwithstanding this fact, the District Court and the Circuit Court found that the respondent was not negligent, raising the issue as to whether or not there is a different duty owed by the United States of America to persons using its roads in Florida than the duty owed by the municipalities and counties in the State of Florida to persons using their roads.

The caption of this case contains the names of all parties involved.

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The United States Court of Appeals for the Fifth Circuit per curium affirmed the decision of the United States District Court for the Northern District of Florida, Pensacola Division. The Fifth Circuit's decision was not reported. However, the District Court did write a memorandum decision. A copy of the District Court's Judgment, Order and Memorandum Decision are incorporated in the Appendix.

JURISDICTIONAL STATEMENT

The United States Court of Appeal for the Fifth Circuit, on May 1, 1980, entered its per curium decision affirming the decision of the United States District Court for the Northern District of Florida, Pensacola Division. (Appendix page 6). On June 20, 1980, the United States Court of Appeal for the Fifth Circuit entered its Order denying the petitioners' Petition for Rehearing. (Appendix page 7). The trial court's decision and the appellate court's opinion affirming the trial court's decision are in conflict with other federal decisions respecting the duty owed by the United States of America to persons using its streets and highways. See, **Newman, Smith, Gilroy,** and **O'Toole.** The appellate court's decision further deviates from its own decision in **Orr,** wherein the Court recognized that what constituted a legal duty and whether such duty has been breached in cases dealing with the Federal Torts Claims Act are questions that should be settled in accordance with the law of the place where the act or omission occurred. The law of the State of Florida in cases such as the one before this Court is that streets must be maintained in a reasonably safe condition, and warnings must be given of known dangers that exist on the street. The Fifth Circuit and the District Court ignored this law that has been established by the Florida Courts. Petitioners submit that the decision by the Fifth Circuit and the District Court is such a departure from and conflicts with the decision of the Florida Courts that this Court should exercise its certiorari power.

There are no constitutional provisions, treaties,

statutes, ordinances or regulations which the case involves.

STATEMENT OF THE CASE AND ARGUMENT

On September 27, 1975, petitioner, Wilbur C. Baker, was traveling on a street operated and maintained by the respondent. At the time the petitioner was traveling over the street maintained by the respondent, there were hazardous and dangerous conditions that existed on the street, dangerous enough to result in the respondent having closed the street to traffic. The respondent had not in any way warned that the road was closed and that hazardous and dangerous conditions existed thereon. The person in charge of the road made a decision that the road should be closed, but failed to complete his duty, and that being to warn. The petitioner, unaware of the hazardous and dangerous conditions that existed on the respondent's road and unaware that the road was closed to traffic, traveled the respondent's road until he came to water that covered the respondent's road. Realizing at that point that the road could not be traveled, petitioner attempted to back up, at which time he backed into a ditch that the resondent had dug alongside of the road. The ditch was eight feet deep, twelve feet wide, and was completely filled with water, hiding one of the dangers along the road, and that being the ditch. As a result of the petitioner traveling on a road that was closed, yet not marked closed, and attempting to remove himself from the peril that existed, and that being the water across the road, he backed into the eight-foot wide, twelve-foot

deep ditch, injuring himself severely, resulting in his becoming a quadriplegic for the remainder of his life. As a result of the petitioner being injured, he filed a claim under the Federal Torts Claims Act, which the respondent offered to settle first in the amount of $100,000.00, (Appendix page 1), and later in the amount of $150,000.00, (Appendix page 2). The petitioners, feeling that their injuries justified more compensation, refused to accept the respondent's offers.

Once the petitioners and respondent had reached an impasse as to the amount the petitioners claimed and the amount the respondent offered, the petitioners filed suit in the United States District Court for the Northern District of Florida, Pensacola Division. The petitioners, confident that the only issue that the court actually needed to resolve was the amount of damages, was astounded when the trial court found that the respondent was not negligent. The trial court's ruling, which was affirmed by the Fifth Circuit, is contrary to the laws of the State of Florida and the case law established by the various federal courts. The trial court cited in its Memorandum Decision, (Appendix page 5), two cases on which it relied in granting the respondent summary judgment. The Fifth Circuit apparently agreed with the trial court that these cases were applicable here. A close look at the two cases cited by the trial court reflects that those cases dealt with a plaintiff injuried at the home of the defendant and the duty that was owed the plaintiff by the defendant. However, it must be remembered that in the instant case, we are concerned with someone traveling a road that is accessible to and used by the public. The fact that it was on a

military reservation does not change the duty the respondent has in regard to control and maintenance of the road. See, **Hernandez**. The Fifth Circuit has recognized this principle in the case of **Orr**, but apparently overlooked it in this case. At page 665 of the **Gilroy** case, the Court stated:

> "The purpose of Federal Tort Claims Act was to abrogate the immunity of the United States against suit in tort. Its purpose was to make the United States liable to suit in tort in the same manner as anyone else. Unlike other statutes waiving government immunity, the Federal Tort Claims Act should be liberally construed in order to effectuate the purpose that was intended by its framers. The words, 'as a private individual', are not used as words of art or as a limitation, but, rather in a descriptive manner to indicate that the United States should be liable in the same manner and to the same extent as anyone else. A municipal corporation may be considered for the purpose of that provision as a private individual, and, therefore it is the view of the Court that the liability of the United States in respect to defects in the streets that it controls is the same as the liability of a municipality in the same jurisdiction or the liability of any other political subdivision in control of streets.

Another District Court case wherein the United States was a defendant was the **Hernandez** case. In that case, the United States had put a road block on a

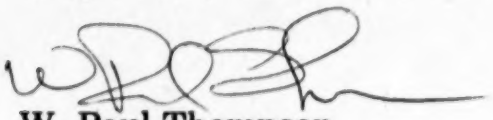
military base. However, there were no warning signs advising the public of the road block. The court held on page 371, "The government has the absolute duty to properly and adequately warn passers along the road of the hazard created."

The duty one owes to persons traveling its streets and roads in Florida is set forth in **Welsh, Trumpe** and **Town of Palm Beach,** which provide that streets must be maintained in a reasonably safe condition and warnings must be given to persons using those streets of known dangerous conditions. Since the federal courts in the various states are required to look to the law of the place where an act or omission occurred when concerned with a case under the Federal Tort Claims Act, (see, **Orr**), it would appear that the trial court and the Fifth Circuit would have followed the law as set forth in **Welsh, Trumpe,** and **Town of Palm Beach.**

It is evident from the trial court's Memorandum Decision, (Appendix page 5), that the trial court and the District Court did not follow these cases. First the trial court specifically tells us the cases that it relied on in determining the duty the respondent owed the petitioners. Secondly, the trial court stated, "There were no signs along the road warning of any dangerous condition." If the trial court had followed the law as set forth in **Welsh, Trumpe,** and **Town of Palm Beach,** it could not have entered summary judgment for the respondent, since the respondent clearly breached its duty to the petitioners, and that duty being to warn of known dangers.

This Court, as it well knows, is the court of last resort for the petitioners and, therefore, petitioners respectfully request that this Court consider the effects of the injustice that has been done by the District Court and the Circuit Court in ignoring the law of the State of Florida, and grant petitioners a writ of certiorari.

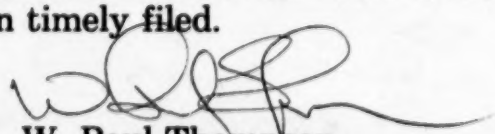
Respectfully submitted,



W. Paul Thompson

CERTIFICATE OF SERVICE

I hereby certify that I have this 12 day of September, 1980, mailed, by certified mail, return receipt requested, postage prepaid, forty copies of the foregoing Petition for Writ of Certiorari to the Clerk, United States Supreme Court, First and Maryland Avenue, N.E., Washington, D.C. 20543; three copies to Nicholas P. Geeker, Esq., Attorney for Respondent, P.O. Box 12313, Pensacola, Florida 32581; and three copies to the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that the foregoing parties are all of the necessary parties required to be served in this matter, and that the same has been timely filed.



W. Paul Thompson
Attorney for Petitioners

Sworn to and subscribed before me
this 12 day of September, 1980.

Rhonda R. Lotte

Notary Public, State of Florida at Large

My commission expires: 8-15-84

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

1980 OCTOBER TERM

WILBUR C. BAKER and wife,
ANNIE JO BAKER,

Petitioners,

vs

THE UNITED STATES
OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

APPENDIX

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DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C. 20324

6 DEC 1977

Mr. Clayton J. M. Adkinson
Thompson, Adkinson & Beasley
P.O. Drawer 608
DeFuniak Springs FL 32433

Re: Claim of Wilbur C. Baker

Dear Mr. Adkinson

The claim for personal injury and property damage of your client, Wilbur C. Baker, stemming from a motor vehicle accident in which Mr. Baker drove his vehicle in reverse into a ditch along Range Road 400, Eglin Air Force Base, Florida, on 27 September 1975, has been considered under the provisions of 28 U.S.C. 2671-2680. After a thorough review of the facts and investigation of the accident, your client's claim has been approved in the amount of $100,000.00.

We believe this sum represents reasonable compensation for your client's personal injuries, in consideration of Florida "pure" comparative negligence doctrine. Assuming arguendo that the Air Force was negligent in failing to properly maintain Range Road 400, there is no question that Mr. Baker's injuries could easily have been avoided had he exercised due care in turning his vehicle around. On the contrary, the facts indicate, and are confirmed by the testimony of Florida Highway Patrolman James L. Fulford and Staff Sergeant Joel Bailey, Mr. Baker did not exercise due care in turning his vehicle around. Both indicate that their observations at the scene of the accident indicate that Mr. Baker drove his vehicle in reverse at an excessive speed, causing him to lose control and back into the drainage ditch.

If Mr. Baker wishes to accept this amount, please have him execute three copies of the attached settlement agreement and return them to the Chief, Claims and Tort Litigation Staff (Stop 324), Office of The Judge Advocate General, 1900 Half Street S.W., Washington, D.C. 20324. This office will then

present the settlement agreement to the Attorney General and, if approved by him, the Treasury Department will issue you a check on behalf of your client.

If you have any questions regarding this settlement offer, please do not hesitate to contact this office. The staff attorney assigned to this case is Captain Mark S. Anderson, who may be reached at (202) 693-1073.

Sincerely

V. A. JORDAN, Colonel, USAF
Director of Civil Law
Office of The Judge Advocate General

1 Atch
Settlement Agreement
(4 Cys)

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C. 20324

9 FEB 1978

Mr. Clayton J.M. Adkinson
Thompson, Adkinson & Beasley
P.O. Drawer 608
De Funiak Springs FL 32433

Re: Claim of Wilbur C. Baker

Dear Mr. Adkinson

We have reviewed Mr. Baker's offer to settle his claim for $750,000.00 as stated in your letter of 19 December 1977.

After another complete analysis of all the facts, including your Fact Sheet contained in your letter as Attachment A, and the applicable law, we are unable to offer Mr. Baker such a settlement. Assuming arguendo that the Air Force was negligent in either not closing Range Road 400 to traffic or clearing the accumulated water off the roadway, it must be concluded that Mr. Baker was negligent in the operation of his van. Thus, any negligence of the Air Force must be compared with the negligence of Mr. Baker. It is apparent that Mr. Baker's injuries could have been avoided had he operated his van in a prudent manner. Therefore, we believe the primary responsibility for this incident lies with Mr. Baker.

Despite this, we have increased our offer in this matter to $150,000.00. If Mr. Baker wishes to accept this amount, please assist him in executing three copies of the enclosed settlement agreement and return them to: Chief, Claims and Tort Litigation Staff, Office of The Judge Advocate General, HQ USAF/JACC, Washington, D.C. 20324. This office will then present the settlement agreement to the Attorney General of the United States; and if approved by him, the Treasury Department will issue you a check on behalf of your client. If Mr. Baker is not satisfied with this decision, he may file a lawsuit in an appropriate United States District Court not later than six months from the mailing of this notification.

Sincerely

LARRY W. SHREVE, Colonel, USAF
Chief, Claims and Tort Litigation Staff
Office of The Judge Advocate General

Atch
Settlement Agreement
(x 4)

EXHIBIT "B"

APPENDIX PAGE 2

JUDGMENT ON DECISION BY THE COURT (CIV 32 (7-63))

United States District Court

FOR THE

Northern District of Florida
Pensacola Division

CIVIL ACTION FILE NO. PCA 78-0434

WILBUR C. BAKER,

vs.

THE UNITED STATES OF AMERICA,

JUDGMENT

This action came on for ~~trial~~ (hearing) before the Court, Honorable Winston E. Arnow, Chief , United States District Judge, presiding, and the issues having been duly ~~tried~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed with prejudice and that the defendant, The United States of America, recover of the plaintiff, Wilbur C. Baker, its costs of action.

Dated at Pensacola, Florida , this 3rd day of October , 19 78.

MARVIN S. WAITS
Clerk of Court

By: Bruce McCardle
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

WILBUR C. BAKER,

Plaintiff,

v. PCA 78-0434

THE UNITED STATES OF AMERICA,

Defendant.

==========

ORDER

In accordance with memorandum decision of this date, it is ORDERED:

1. Motion of defendant United States of America for summary judgment is hereby granted.

2. The Clerk of this Court will enter judgment in favor of defendant, dismissing this action with prejudice and at plaintiff's cost.

DONE and ORDERED this 3 day of October, 1978.

WINSTON E. ARNOW, Chief Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

WILBUR C. BAKER,

Plaintiff,

v. PCA 78-0434

THE UNITED STATES OF AMERICA,

Defendant.

==========

MEMORANDUM DECISION

Before the court is motion of defendant for summary judgment.

The basic facts are not in dispute. Plaintiff Wilbur C. Baker with his two sons was traveling on a range road through a portion of Eglin Air Force Base Reservation which was open to the public for outdoor recreational purposes. A hurricane had passed through the area several days before leaving water standing on the road at one point. Defendant had dug a ditch alongside the road in an effort to drain the water off. When plaintiff reached this point he saw both the standing water and the ditch. He decided not to drive through the water but to back up the road past the end of the ditch and turn around. In attempting to do so, he somehow backed into the ditch and was injured. There were no signs along the road warning of any dangerous condition.

In this case the parties are apparently in agreement and the court concurs that plaintiff's status was that of a public invitee. Post v. Lunney, 261 So. 2d 146 (Fla. 1972); Wood v. Camp, 284 So. 2d 691 (Fla. 1973). As such, defendant was not liable to him for injury caused by a condition of the land which was known and obvious to him unless defendant should have anticipated the harm despite the plaintiff's knowledge and the obviousness of the danger. Restatement of Torts 2d §343A; 23 Fla. Jur. Negligence §45.

[illegible]-3 [illegible]52

In this case the testimony is uncontradicted that the water standing on the road and the ditch alongside it were open and obvious conditions and plaintiff himself testified he was aware of both conditions. There is nothing to indicate defendant could have anticipated plaintiff's actions or the resulting harm to him. There is not here involved a question of assumption of risk or comparative negligence which depend upon pre-existing negligence of defendant. Rather, the facts here present a case in which no negligence on the part of defendant is shown and plaintiff's own negligence was the sole legal cause of his injuries.

In his letter memo plaintiff contends the patent danger doctrine has been absorbed into the doctrine of contributory negligence. However, the doctrine referred to in the case cited, Blaw-Knox Food & Chemical Equipment Co. v. Holmes, 348 So. 2d 604 (Fla. App. 1977) involves products liability. That doctrine was to the effect that a manufacturer is under no duty to render an article or machine "more safe" if the danger to be avoided is open and obvious to all. In that situation, the court in Blaw-Knox held the doctrine was merged in the defense of contributory negligence and the principles of comparative negligence. No case has been cited to, or found by, the court to change the principles respecting liability of a landowner to an invitee in a situation involving an open and obvious condition existing on land. If such principles are to be changed, it is not for this court to do so. Moreover, as previously pointed out, plaintiff's own negligence was the sole legal cause of his injuries.

In view of the foregoing the court finds there is no genuine issue of material fact and defendant is entitled to a judgment as a matter of law.

In view of the foregoing, the court concludes it unnecessary to consider the applicability of F.S. §375.251 to the situation here involved.

Order will be entered granting motion for summary judgment and directing entry by the Clerk of judgment in defendant's favor dismissing this action with prejudice and at plaintiff's cost.

DATED this 3rd day of October, 1978.

Winston E. Arnow
Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 78-3679

WILBUR C. BAKER and wife, ANNIE JO BAKER,

Plaintiffs-Appellants,

versus

THE UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Florida

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(MAY 1, 1980)

Before FAY, KRAVITCH and RANDALL, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1/]

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
RECEIVED
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NEW ORLEANS LA.

NO. 78-3679

WILBUR C. BAKER and wife,
ANNIE JO BAKER,

Plaintiffs-Appellants,

versus

U.S. COURT OF APPEALS
FILED
JUN 20 1980
GILBERT E. GANUCHEAU
CLERK

THE UNITED STATES OF AMERICA,

Defendant-Appellee.

- - - - -

Appeal from the United States District Court for the
Northern District of Florida

- - - - -

ON PETITION FOR REHEARING

(June 20, 1980)

Before FAY, KRAVITCH and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Phyllis Kravitch
United States Circuit Judge

Form 703-2